Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: September 11, 2007 **Released: October 1, 2007**

Comment Date: 30 days after date of publication in the Federal Register
Reply Comment Date: 45 days after date of publication in the Federal Register

By the Commission: Chairman Martin and Commissioners Adelstein, Tate and McDowell issuing separate statements; Commissioner Copps approving in part, concurring in part and issuing a statement

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended ("Communications Act") generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators (the "exclusive contract prohibition").[1] In this *Order*, we find that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming, and accordingly, retain it again for five years, until October 5, 2012. In the *Order*, we decline to narrow the scope of the exclusive contract prohibition based on the popularity of the programming network, based on the competitive circumstances in individual geographic areas served by a

[1] 47 U.S.C. § 548(c)(2)(D).

cable operator, or by precluding certain competitive multichannel video programming distributors ("MVPDs")[2] from benefiting from the prohibition. We also decline to expand the exclusive contract prohibition to apply to non-cable-affiliated programming, and we again conclude that terrestrially delivered programming is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). In the *Notice of Proposed Rulemaking* ("*NPRM*"), we seek comment on revisions to the Commission's program access and retransmission consent rules and whether it may be appropriate to preclude the practice of programmers to tie desired programming with undesired programming. First, the Commission seeks comment on whether it can establish a procedure that would shorten the term of the five-year extension of the exclusive contract prohibition if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a Designated Market Area. Second, the *NPRM* seeks comment on whether it would be appropriate to extend the Commission's program access rules to all terrestrially delivered cable-affiliated programming pursuant to various provisions of the Communications Act. Third, we seek comment on whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a Direct Broadcast Satellite ("DBS") provider. Fourth, given the problems associated with programming tying arrangements, the *NPRM* seeks comment on whether it may be appropriate for the Commission to preclude such arrangements. Accordingly, the *NPRM* (i) seeks comment on how retransmission consent negotiations are impacted when broadcasters tie carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks; (ii) seeks comment on whether Section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, term, and conditions; and (iii) seeks comment on whether the Commission should require terrestrially delivered cable programming networks and programming networks affiliated with neither a cable operator nor a broadcaster to be offered on a stand-alone basis to all MVPDs at reasonable rates, term, and conditions. Fifth, the *NPRM* seeks comment on whether and how we should address additional program access concerns raised in this proceeding by small and rural MVPDs regarding allegedly onerous and unreasonable conditions imposed by some programmers for access to their content. In the *NPRM*, we also seek comment on whether to (i) establish a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of the complaint; and (ii) require parties to submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process.

2. Further, we modify our procedures for resolving program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding that expressly relies upon a document in asserting a defense include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a

[2] 47 U.S.C. § 522(13) ("multichannel video programming distributor" means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming"). The term "competitive MVPD" refers to MVPDs that compete with incumbent cable operators.

complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. We decline to (i) mandate electronic filings of pleadings at this time (but we note that parties currently may voluntarily submit electronic copies of their pleadings to staff via e-mail); (ii) adopt a more expedited pleading cycle for program access complaints; (iii) mandate weekly status conferences; (iv) shift resolution of program access complaints to the Enforcement Bureau; or (v) adopt mandatory arbitration.

II. BACKGROUND

A. Exclusive Contract Prohibition

3. In enacting the program access provisions, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress intended to encourage entry into the MVPD market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable competitors.[3] The 1992 Cable Act and its legislative history[4] reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration,[5] created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.[6] Congress concluded at that time that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, such as other cable systems, home satellite dish ("HSD") distributors, direct broadcast satellite ("DBS") providers, satellite master antenna television ("SMATV") systems, and wireless cable operators.[7]

4. When the Commission promulgated regulations implementing the program access provisions of Section 628,[8] it recognized that Congress placed a higher value on new competitive entry into the MVPD marketplace than on the continuation of exclusive distribution practices when such practices impede this entry.[9] Congress absolutely prohibited exclusive contracts for satellite cable programming or satellite broadcast programming[10] between vertically integrated programming vendors

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[3] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *See* H.R. Rep. No. 102-628 (1992); S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102-862 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231.

[5] Vertical integration means the combined ownership of cable systems and suppliers of cable programming.

[6] 1992 Cable Act § 2(a)(2).

[7] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365-67, ¶ 21 (1993) ("*First Report and Order*"), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994).

[8] *See First Report and Order*, 8 FCC Rcd 3359 (1993).

[9] *See id.* at 3384, ¶ 63.

[10] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

and cable operators in areas unserved by cable,[11] and generally prohibited exclusive contracts within areas served by cable:

> with respect to distribution to persons in areas served by a cable operator, [the Commission shall] prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest.[12]

Congress recognized that, in areas served by cable, some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs.[13] Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "petition for exclusivity" to the Commission for approval.[14]

5. Congress directed that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[15] In October 2001, the Commission sought comment on this issue,[16] and ultimately concluded that the exclusive contract prohibition did continue to be "necessary."[17] The Commission therefore extended the prohibition for five years (*i.e.*, through October 5, 2007).[18] The Commission explained that the prohibition remained necessary because, based on marketplace conditions at the time, cable-affiliated programmers retained the ability and incentive to

[11] 47 U.S.C. § 548(c)(2)(C).

[12] 47 U.S.C. § 548(c)(2)(D); *see also* 47 C.F.R. § 76.1002(c)(2).

[13] 47 U.S.C. § 548(c)(2)(4). In determining whether an exclusive contract is in the public interest, Congress instructed the Commission to consider each of the following factors: (i) the effect of such exclusive contract on the development of competition in the local and national MVPD markets; (ii) the effect of such exclusive contract on competition from MVPD technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the MVPD market; and (v) the duration of the exclusive contract. *See id.*

[14] *See* 47 C.F.R. § 76.1002(c)(5).

[15] 47 U.S.C. § 548(c)(5).

[16] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001) ("*2001 Sunset NPRM*").

[17] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12153-54, ¶ 65 (2002) ("*2002 Extension Order*").

[18] *See id.*

withhold programming from unaffiliated MVPDs such that competition and diversity in the distribution of video programming would be impaired without the rule:[19]

> [t]he competitive landscape of the market for the distribution of multichannel video programming has changed for the better since 1992. The number of MVPDs that compete with cable and the number of subscribers served by those MVPDs have increased significantly. We find, however, that the concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace.[20]

6. When it extended the exclusive contract prohibition, the Commission also resolved a number of other critical issues raised by commenters with respect to Section 628(c)(5), such as (i) the definition of "necessary" as used in Section 628(c)(5);[21] (ii) whether the Commission can use its predictive judgment in assessing if the exclusive contract prohibition continues to be necessary;[22] (iii) whether extending the exclusive contract prohibition withstands an intermediate scrutiny test pursuant to First Amendment jurisprudence;[23] (iv) whether there exists a class of "must have" programming for which there are no readily available substitutes and, without access to which, competitive MVPDs would be limited in their ability to compete in the video distribution market;[24] (v) the impact of increased clustering and consolidation of cable systems on competition in the video distribution marketplace and the necessity of the exclusive contract prohibition;[25] (vi) the relevance of antitrust laws to the Commission's

[19] *See id.* at 12125, ¶ 3.

[20] *See id.* at 12153-54, ¶ 65.

[21] *See id.* at 12128-30, ¶¶ 10-14 ("[W]e conclude that the exclusivity prohibition continues to be 'necessary' if, in the absence of the prohibition, competition and diversity would not be preserved and protected.") (footnotes omitted).

[22] *See id.* at 12130-31, ¶ 16 ("While specific factual evidence is necessary, it alone may not be sufficient to make that determination; we believe that the Commission may also rely on economic theory and its predictive judgment.") (footnotes omitted); *id.* at 12135-36, ¶ 25 ("[I]n determining whether to sunset the exclusivity prohibition, we will rely on the factual evidence available, economic theory and the Commission's predictive judgment of the direction in which the future public interest lies.").

[23] *See id.* at 12143, ¶ 45 n.138 ("Further, we reject AOLTW's argument that First Amendment concerns mandate sunset of the exclusivity prohibition. . . . The exclusivity prohibition was previously upheld in the face of a First Amendment challenge. . . . [A]s described herein, we believe the record fully supports our finding that vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace and diversity in the distribution of video programming preserved and protected.").

[24] *See id.* at 12139, ¶ 33 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this "must have" programming, their ability to retain subscribers would be jeopardized.").

[25] *See id.* at 12145, ¶ 47 ("We believe that clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."); *id.* at 12150-51, ¶ 58 ("[C]onsolidation within the industry since passage of the 1992 Act affords [cable] operators greater direct incentives to advantage their own system operations even at the cost of some immediate advantage in terms of foregone revenues from content distribution to competitors.").

assessment of whether to permit the exclusive contract prohibition to sunset;[26] (vii) the relevance of the impact of the exclusive contract prohibition on incentives to create programming;[27] (viii) whether terrestrially delivered programming falls within the exclusive contract prohibition in Section 628(c)(2)(D);[28] (ix) whether treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusive contract prohibition is consistent with the text and intent of Section 628(c)(2)(D);[29] and (x) whether other provisions of the Communications Act, such as Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B), are adequate substitutes for the protection afforded under Section 628(c)(2)(D).[30] No party sought reconsideration or other review of the Commission's decision to extend the exclusive contract prohibition or its conclusions on these other critical issues.

7. The Commission further provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[31] We issued the *Notice* in February 2007 to initiate this review.[32] Comments pertaining to the exclusive contract prohibition were filed by large incumbent cable operators,[33] new and established competitors to these large incumbent cable operators,[34] consumer groups,[35] and other individuals and entities interested in the exclusive contract prohibition.[36]

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[26] *See id.* at 12143, ¶ 45 n.138 ("By passing Section 628, Congress already determined that antitrust laws were not a viable alternative for achieving the government's goals in this instance.")

[27] *See id.* at 12152, ¶ 62 ("[I]n considering whether to retain the exclusivity prohibition, our primary focus should be on preserving and protecting diversity in the *distribution* of video programming.") (emphasis added).

[28] *See id.* at 12158, ¶ 73 ("[T]he Commission has concluded that . . . terrestrially delivered programming is 'outside of the direct coverage of Section 628(c).' We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion." (citing *DIRECTV, Inc. v. Comcast Corp. et al.*, 15 FCC Rcd 22802 (2000))).

[29] *See id.* at 12156, ¶ 69 ("We believe treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusivity prohibition is consistent with Section 628(c)(2)(D) and the definitions set forth in Sections 628(i)(1) and (3). We will therefore not narrow the scope of the exclusivity prohibition to only so-called essential programming services.") (footnote omitted).

[30] *See id.* at 12154, ¶ 65 n. 206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D).").

[31] *See id.* at 12161, ¶ 80.

[32] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252, 4252-53, ¶ 1 (2007) ("*Notice*").

[33] In their comments, large incumbent cable operators urge the Commission to allow the exclusive contract prohibition to sunset. This group of commenters is collectively referred to herein as "cable multiple system operators" or "cable MSOs." This group of commenters includes the following: Cablevision Systems Corp. ("Cablevision"); Comcast Corporation ("Comcast"); National Cable & Telecommunications Association ("NCTA"); and Time Warner Inc. ("Time Warner").

[34] In their comments, new and established competitors to the cable MSOs urge the Commission to allow the exclusive contract prohibition to continue. This group of commenters includes (i) established competitors (such as DBS operators); (ii) new competitors (such as wireline entrants, including telephone companies beginning to enter the video distribution market); and (iii) small and rural incumbent cable operators that assert that they do not have the means to invest in their own programming and thus stand to be harmed rather than benefit from sunset of the (continued....)

B. Program Access Complaint Procedures

8. Section 628 of the Communications Act prohibits unfair methods of competition or unfair or deceptive practices that hinder or prevent any MVPD from providing satellite-delivered programming to consumers.[37] Section 628(b) provides:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[38]

Section 628, among other things, protects access to vertically integrated cable programming services by competing MVPDs in order to increase competition and diversity in the MVPD market and foster the development of competition to traditional cable systems.[39]

9. Parties aggrieved by conduct alleged to violate the program access provisions have the right to commence an adjudicatory proceeding before the Commission.[40] As instructed by Section 628(c), the Commission promulgated regulations implementing a program access complaint process.[41] The Commission determined that a streamlined program access complaint process, with limited discovery procedures and adjudication based on a complaint, answer, and reply, would provide the most flexible and

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exclusive contract prohibition. This group of commenters is collectively referred to herein as "competitive MVPDs." This group of commenters includes the following: American Cable Association ("ACA"); AT&T Inc. ("AT&T"); Broadband Service Providers Association ("BSPA"); Coalition for Competitive Access to Content ("CA2C"); DIRECTV, Inc. ("DIRECTV"); EATEL Video, LLC ("EATEL"); EchoStar Satellite L.L.C. ("EchoStar"); National Rural Telecommunications Cooperative ("NRTC"); National Telecommunications Cooperative Association ("NTCA"); Organization for the Promotion and Advancement of Small Telecommunications Companies and the Independent Telephone and Telecommunications Alliance ("OPASTCO/ITTA"); Qwest Communications International Inc. ("Qwest"); RCN Telecom Services, Inc. ("RCN"); The Rural Independent Competitive Alliance ("RICA"); SureWest Communications ("SureWest"); The United States Telecom Association ("USTelecom"); and Verizon.

[35] The Consumer Federation of America, Consumers Union, Free Press, Media Access Project, and Communications Workers of America (collectively, "Consumer Groups") argue that the exclusive contract prohibition remains essential to promoting video competition and that the Commission should therefore extend the exclusive contract prohibition for at least an additional five years. *See* Consumer Groups Reply Comments at 7.

[36] Other parties that filed comments include Carol L. Carlson; The Walt Disney Company, CBS Corporation, Fox Entertainment Group, and NBC Universal (collectively, the "Broadcast Networks"); and Office of Advocacy of the United States Small Business Administration ("SBA Advocacy Office").

[37] 47 U.S.C. § 548.

[38] *Id.* § 548(b). As part of the Telecommunications Act of 1996, Congress expanded program access protection to include common carriers and their affiliates that provide video programming by any means directly to subscribers, and to satellite cable programming vendors in which a common carrier has an attributable interest. *See id.* § 548(j).

[39] *Id.* § 548(a).

[40] *Id.* § 548(d).

[41] *See First Report and Order*, 8 FCC Rcd 3359 (1993).

expeditious means of enforcing the anti-discrimination program access provisions.[42] The Commission further addressed program access complaint process issues in response to a petition for rulemaking filed by Ameritech New Media, Inc.[43] The Commission resolved these and other issues in the *1998 Program Access Order*.[44]

10. In the *1998 Program Access Order*, the Commission affirmed its authority to impose damages on a case-by-case basis for program access violations and adopted guidelines for resolving program access disputes so that denial of programming cases, such as unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints, are resolved within five months of the submission of the complaint to the Commission and all other program access complaints, including price discrimination cases, are resolved within nine months of the submission of the complaint to the Commission. The Commission subsequently amended the program access rules as part of an overhaul of the Commission's pleading and complaint rules.[45]

11. In the *Notice*, in addition to seeking comment on extension of the exclusive contract prohibition, we sought comment on whether and how our procedures for resolving program access disputes under Section 628 should be modified.[46] We sought comment on the costs associated with the complaint process and whether the pre-filing notice, pleading requirements, evidentiary standards, timing, and potential remedies are appropriate and effective. We also sought comment on whether specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of program access complaints. We asked whether the program access complaint rules and procedures, including those governing discovery and protection of confidential information, are adequate. We also asked whether we should adopt alternative procedures or remedies such as mandatory standstill agreements or arbitration, as the Commission has done in recent mergers.[47]

[42] *See id.* at 3416, ¶ 123.

[43] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 22840 (1997). Ameritech requested that the Commission amend its rules to provide time limits for the resolution of program access complaints; to provide program access litigants discovery as-of-right; and to impose damages for adjudicated program access violations. *Id.* at 22855-61, ¶¶ 37-49.

[44] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 (1998) ("*1998 Program Access Order*").

[45] *See 1998 Biennial Review - Part 76 Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418 (1999) ("*1998 Biennial Review*"); *recon. denied*, FCC 99-258, 1999 WL 766253 (rel. Sept. 29, 1999).

[46] *See Notice*, 22 FCC Rcd at 4259-60, ¶¶ 13-16.

[47] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8274-77, ¶¶ 156-65 (2006) ("*Adelphia Order*"); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 552-55, ¶¶ 172-79 (2004) ("*Hughes Order*").

III. DISCUSSION

A. Exclusive Contract Prohibition

12. Our analysis of whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming" proceeds in five parts. Based on this five-part analysis, we conclude as explained below that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming and, accordingly, retain it again for five years. First, we review the standard we must apply in determining whether to allow the exclusive contract prohibition to continue. Second, we examine the changes that have occurred in the video programming and distribution markets since 2002 when we last decided that the exclusive contract prohibition continued to be necessary to preserve and protect competition. Third, in light of the changes that have occurred in the programming and distribution market since 2002, we assess whether vertically integrated program suppliers today retain both the ability and incentive to favor their affiliated cable operators over nonaffiliated MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule. Fourth, we assess proposals presented by commenters to narrow the scope of the exclusive contract prohibition and to apply an exclusive contract prohibition to programming networks affiliated with non-cable MVPDs and to unaffiliated programming networks. Fifth, we consider the appropriate length of time for an extension of the exclusive contract prohibition. We also briefly address other issues raised by some small and rural MVPDs regarding program access issues other than the exclusive contract prohibition.

1. Standard of Review

13. Various cable MSOs repeat arguments made in response to the *2001 Sunset NPRM* that the Commission should construe the term "necessary" as used in Section 628(c)(5) as requiring the exclusive contract prohibition to be "indispensable" or "essential" to prevent harm to competition.[48] In the *2002 Extension Order*, the Commission explained that the term "necessary" has been interpreted differently depending on the statutory context.[49] In some cases, courts have interpreted the term to mean "useful," "convenient," or "appropriate"[50] while in other contexts courts have interpreted the term in a more restrictive sense to mean "indispensable" or "essential."[51] Consistent with judicial precedent, the

[48] *See* Cablevision Comments at 6; Comcast Comments at 5 n.4.

[49] *See 2002 Extension Order*, 17 FCC Rcd at 12129-30, ¶ 14.

[50] *See id.* at 12129, ¶ 14 n.30 (citing *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 377-78 (1946) (state legislation "invalid if it unduly burdens commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplishing a permitted purpose"); *Armour & Co. v. Wantouk*, 323 U.S. 126, 129-30 (1944) (term "necessary" in the Fair Labor Standards Act, in context, means reasonably necessary to production, and not "indispensable," "essential," or "vital"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (term "necessary" in the "necessary and proper" clause of the U.S. Constitution means "convenient, or useful," and does not limit congressional power to the "most direct and simple" means available); *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (term "necessary" in the National Bank Act means "convenient" or "useful")). *See also* AT&T Reply Comments at 3 n.4 (citing *Cellco Partnership v FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004) (noting that "necessary" does not always mean "indispensable" or "essential"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390-95 (3d Cir. 2004) (upholding a standard under which "necessary" means "convenient, useful, or helpful"), *cert. denied*, 545 U.S. 1123 (2005)).

[51] *See id.* at 12129, ¶ 14 n.31 (citing *Kirschbaum v. Arsenal Building Corp.*, 316 U.S. 517, 525-26 (1942) (term "necessary" in the Fair Labor Standards Act means "indispensable" and "essential")). *See also* Cablevision (continued....)

Commission construed the term "necessary" in its statutory context[52] and determined that the exclusive contract prohibition continues to be "necessary" if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.[53] We find no basis to revisit the conclusions reached in the *2002 Extension Order*, which, we note, were never challenged. We continue to believe that Section 628(c)(5), when construed in its statutory context, requires the exclusive contract prohibition to be extended if we find that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.

14. We disagree with Cablevision to the extent it argues that the Commission must rely exclusively on specific factual evidence and cannot use its predictive judgment in assessing whether the exclusive contract prohibition continues to be "necessary" to preserve and protect competition and diversity in the distribution of video programming.[54] Rather, as the Commission concluded in the *2002 Extension Order*, while specific factual evidence is a necessary part of our analysis, it may not be sufficient in order for us to make a reasoned determination. Indeed, because the exclusive contract prohibition has been in effect since 1992, it is difficult to obtain specific factual evidence of the impact on competition in the video distribution market if the prohibition were lifted.[55] Accordingly, we continue to believe that we can also rely on economic theory and predictive judgment in addition to specific factual evidence in reaching our decision concerning the continued need for the exclusive contract prohibition.

15. We find that there is no statutory bar to a second extension of the exclusive contract prohibition. Cablevision claims that Section 628(c)(5) requires the Commission to conduct its review of the exclusive contract prohibition only once.[56] There is nothing in the statute, however, that limits the Commission to a single review. Nor does Section 628(c)(5) specify a time period for how long the prohibition must continue in the event the Commission finds a continuing need for the prohibition. Rather, it was left to the Commission's discretion to prescribe the period of any such extension.[57] Establishing a fixed date for sunset of the prohibition without conducting a further proceeding to determine whether the prohibition is still "necessary to preserve and protect competition and diversity in the distribution of video programming" would not be consistent with congressional intent.[58] The

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Comments at 6 n.16; Comcast Comments at 5 n.4 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-90 (1999); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000)).

[52] *See 2002 Extension Order*, 17 FCC Rcd at 12130, ¶ 14 n.32 (citing *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (statute must be read as a whole, since the meaning of statutory language, plain or not, depends on context)).

[53] *See 2002 Extension Order*, 17 FCC Rcd at 12129-30, ¶ 14.

[54] *See* Cablevision Comments at 7.

[55] *See 2002 Extension Order*, 17 FCC Rcd at 12135-36, ¶ 25; *see also* Verizon Comments at 3 (noting that it has not faced difficulty in obtaining satellite-delivered vertically integrated programming while the exclusive contract prohibition is in effect but that it expects the situation to change if the prohibition were allowed to sunset). We note, however, that for vertically integrated programming that is delivered terrestrially and therefore is beyond the scope of Section 628(c), there is specific factual evidence that cable operators have withheld this programming from competitors and that such withholding has had a material adverse impact on competition in the video distribution market. *See infra* Section III.A.3.b; *see also* AT&T Comments at 4; BSPA Comments at 17; CA2C Comments at 17; RICA Comments at 5; SureWest Comments at 5-6; EchoStar Reply Comments at 16-17.

[56] *See* Cablevision Comments at n.13 (citing 47 U.S.C. § 548(c)(5) ("The prohibition . . . shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary . . . .")).

[57] *See 2002 Extension Order*, 17 FCC Rcd at 12159-60, ¶ 77.

[58] *See id.* at 12160, ¶ 78; *see* AT&T Reply Comments at 13 n.50; EchoStar Reply Comments at 13 n.22.

Commission thus concluded in the *2002 Extension Order* that the adoption of a five-year extension was conditioned on an additional review during the last year of this extension.[59] We note that neither Cablevision nor any other commenter challenged the Commission's decision in the *2002 Extension Order* to conduct a further review of the exclusive contract prohibition.

2. Status of the MVPD Market: 2002-2007

16. We examine below the changes that have occurred in the programming and distribution markets since 2002 when the Commission last reviewed whether the exclusive contract prohibition continued to be necessary to preserve and protect competition. As discussed below, the markets for both programming and distribution reflect some pro-competitive trends since 2002: (i) an increase in programming networks; (ii) a decrease in the percentage of popular national and regional networks that are affiliated with cable operators; and (iii) an increase in the market penetration of MVPDs that compete with incumbent cable operators.[60] As discussed in Section III.A.3 below, however, we conclude that, even with these developments in the programming and distribution markets, the concerns upon which Congress based the program access provisions persist in the marketplace, and thus we find the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

17. *Satellite-Delivered National Programming Networks.* The number of satellite-delivered national programming networks available to MVPDs has increased by 237 since 2002, from 294 networks[61] to 531 networks.[62] This amounts to an eighty percent increase in satellite-delivered national programming networks available to MVPDs.

18. *Vertically Integrated Satellite-Delivered National Programming Networks.* The number of satellite-delivered national programming networks that are vertically integrated with cable operators has increased by twelve since 2002, from 104 networks[63] to 116 networks.[64] The percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has declined since 2002, from 35 percent[65] to 22 percent.[66] EchoStar argues that, if international and non-

[59] *See 2002 Extension Order*, 17 FCC Rcd at 12161, ¶ 80.

[60] For the most part, the data noted herein comes from our *12th Annual Report* on video competition, which reflects data on the video distribution and programming markets as of June 2005. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) ("*12th Annual Report*"). To the extent indicated, we also note more recent data and significant changes since the *12th Annual Report* which were provided by commenters.

[61] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, 1309-10, ¶ 157 (2002) ("*8th Annual Report*")).

[62] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); USTelecom Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[63] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

[64] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*.

[65] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

English programming is excluded, then the percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has only declined from 36 percent to 34 percent since 2002.[67] Comcast contends that, if the vertically integrated iN DEMAND pay-per-view network is considered as a single network rather than sixty separate networks, then the percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators is as low as 13.5 percent.[68]

19. The amount of the most popular programming that is vertically integrated with cable operators has declined slightly since 2002. While nine of the Top 20 (45 percent) satellite-delivered national programming networks (as ranked by subscribership) were vertically integrated in 2002 when the Commission last reviewed the exclusive contract prohibition,[69] commenters state that this number has decreased to seven (35 percent): The Discovery Channel, CNN, TNT, TBS, TLC, Headline News, and Cartoon Network.[70] As discussed below, we find that this number has decreased to six.[71] EchoStar notes that four cable-affiliated networks are among the Top 10 networks as ranked by subscribership, the same number as in 2002.[72] AT&T notes further that of the 91 non-premium cable programming networks with at least 20 million subscribers, 33 networks (or 36 percent) are affiliated with cable operators.[73] While seven of the Top 20 (35 percent) satellite-delivered national programming networks (as ranked by prime time ratings) were vertically integrated in 2002,[74] commenters state that this number has decreased to four

(Continued from previous page)
[66] *See 12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21 and 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 19 and 28 n.100 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); NCTA Comments at 5; Verizon Comments at 8 (citing *12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21).

[67] *See* EchoStar Comments at 9-10. Verizon notes that approximately 32 percent of the more than 250 regional and national networks that comprise Verizon's FiOS TV service are vertically integrated with incumbent video providers. *See* Verizon Comments at 8.

[68] Cable MSOs argue that the higher percentage (22 percent) calculated by the Commission in the *12th Annual Report* is overstated because the Commission considered the iN DEMAND pay-per-view network as if it were sixty separate networks. *See* Comcast Comments at 12 n.36; NCTA Comments at 5 n.12; Comcast Reply Comments at 9 n.21.

[69] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1363, Table D-6).

[70] *See 12th Annual Report*, 21 FCC Rcd at 2578-79, ¶ 163 and 2654, Table C-5. While the *12th Annual Report* does not list Cartoon Network among the Top 20 networks as ranked by subscribership, AT&T notes data as of December 2006 that lists Cartoon Network among the Top 20. *See* AT&T Comments at 12 n.22 (citing "Top Cable Program Networks – as of December 2006," available at http://www.ncta.com/ContentView.aspx?contentId=74 (citing Kagan Research, LLC, "Cable Program Investor," Jan. 31, 2007) (last visited August 6, 2007)).

[71] *See infra* ¶ 37. These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News. *See* Kagan Research, LLC, *Network Census: June 30: Cable Program Investor* (July 28, 2006) at 11.

[72] *See* EchoStar Comments at 6 (citing *8th Annual Report*, 17 FCC Rcd at 1363, Table D-6 and *12th Annual Report*, 21 FCC Rcd at 2654, Table C-5). These networks are The Discovery Channel, CNN, TNT, and TBS. *See 12th Annual Report*, 21 FCC Rcd at 2654, Table C-5.

[73] *See* AT&T Comments at 12-13 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 97-519 (2007)).

[74] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364, Table D-7).

of the Top 20 (20 percent): TNT, TBS, The Discovery Channel, and Cartoon Network.[75] As discussed below, we find that this number has remained the same at seven.[76] Cablevision states that (i) less than one-third of the forty most-popular national programming networks as ranked by prime-time ratings are affiliated with cable operators; and (ii) only three cable-affiliated networks have an average prime-time rating above 1.0.[77] AT&T notes that (i) TNT has remained the number one prime-time rated cable network for every year since 2002;[78] and (ii) as ranked by all-day ratings, five cable-affiliated networks are among the Top 20, including two of the top three: TNT (ranked number two); Cartoon Network (ranked number three); TBS (ranked number seven); CNN (ranked number nineteen); and The Discovery Channel (ranked number twenty).[79]

20. Only the largest cable MSOs tend to own vertically integrated programming.[80] In the *2002 Extension Order*, the Commission noted that all vertically integrated programming was attributable to five cable operators, four of which were among the seven largest cable MSOs.[81] Today, all vertically integrated programming is attributable to five cable operators, all of which are among the six largest cable MSOs: Comcast, Time Warner, Cox, Cablevision, and Advance/Newhouse.[82]

21. *Regional Programming Networks.* The number of regional programming networks available to MVPDs has increased by sixteen since 2002, from 80 networks[83] to 96 networks.[84] This amounts to a 20 percent increase since 2002 in regional programming networks available to MVPDs. The

[75] *See 12th Annual Report*, 21 FCC Rcd at 2579, ¶ 164 and 2655, Table C-6. In the *2002 Extension Order*, the Commission noted data from the *8th Annual Report*, which listed the Top 20 cable networks as ranked by prime time ratings. *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364, Table D-7). The *12th Annual Report* lists the Top 15 cable networks as ranked by prime time ratings, rather than the Top 20. *See 12th Annual Report*, 21 FCC Rcd at 2579, ¶ 164 and 2655, Table C-6. While the *12th Annual Report* does not list Cartoon Network among the Top 15 networks as ranked by prime time ratings, AT&T cites recent data indicating that Cartoon Network is still among the Top 20. *See* AT&T Reply Comments at 7 n.22 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 50 (2007)).

[76] These networks are TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel. *See* Nielsen Media Research, *Top 50 Cable Networks Primetime* (June 2006).

[77] *See* Cablevision Comments at 2-3 (citing Kagan Research LLC, *Economics of Basic Cable Networks* at 50 (2006)); Cablevision Reply Comments at 9 (same).

[78] *See* AT&T Reply Comments at 7 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 50 (2007)).

[79] *See id.* (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 51-52 (2007)).

[80] *See 2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18.

[81] *See id.*

[82] *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[83] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[84] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 22 n.75 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166); EchoStar Comments at 6 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166); Verizon Comments at 9-10 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22).

number of regional sports networks ("RSNs") has increased by approximately 36 percent since 2002, from 28 networks[85] to 39 networks, by some estimates.[86]

22. *Vertically Integrated Regional Programming Networks.* The number of regional programming networks that are vertically integrated with cable operators has increased by five since 2002, from 39 networks[87] to 44 networks.[88] The percentage of all regional programming networks that are vertically integrated with cable operators, however, has declined slightly since 2002, from 49 percent[89] to 46 percent.[90] The number of RSNs that are vertically integrated with cable operators has decreased by six since 2002, from 24 networks[91] to 18 networks, by some estimates.[92] The percentage of all RSNs that are vertically integrated has declined since 2002, from 86 percent[93] to approximately 46 percent.[94]

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[85] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[86] We note that, according to the Commission's most recent annual competition report, there were 37 RSNs as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. More recent data indicates that there are now 39 RSNs. *See* Cablevision Comments at 23 n.80 (stating that the *12th Annual Report* did not include the Mid-Atlantic Sports Network ("MASN"), an RSN that is not affiliated with cable operators); Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York, an RSN affiliated with Comcast).

[87] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[88] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* EchoStar Reply Comments at 11-12 n.19 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166).

[89] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[90] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* USTelecom Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166). Verizon states that eighty percent of the regional networks it offers as part of FiOS TV are vertically integrated with cable operators. *See* Verizon Comments at 9.

[91] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[92] We note that, according to the Commission's most recent annual competition report, there were 17 vertically integrated RSNs as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. More recent data indicates that there are now 18 vertically integrated RSNs. *See* Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York, an RSN affiliated with Comcast, thereby increasing the number of vertically integrated RSNs to 18).

[93] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[94] We note that, according to the Commission's most recent annual competition report, 45.9 percent of RSNs were vertically integrated as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. If the unaffiliated MASN and the cable-affiliated SportsNet New York are included, then 18 out of 39 RSNs, or 46.1 percent, are vertically integrated. *See* Cablevision Comments at 23 n.80 (stating that the *12th Annual Report* did not include MASN); Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York). Comcast notes that it is affiliated with eight regional programming networks that show some sports programming: Comcast Sports Southeast; Comcast SportsNet Philadelphia; Comcast SportsNet Mid-Atlantic; (continued....)

23. *MVPD Market.* Since the Commission last examined the exclusive contract prohibition in 2002, the percentage of MVPD subscribers receiving their video programming from a cable operator has declined from 78 percent[95] to 67 percent, by some estimates.[96] The number of cable subscribers has declined by 3.4 million since 2002, from 69 million[97] to 65.4 million.[98] During this same period, the percentage of MVPD subscribers receiving their video programming from a DBS operator has increased from 18 percent[99] to over 30 percent, by some estimates.[100] The number of DBS subscribers has increased by 11.6 million since 2002, from 18 million[101] to 29.6 million, by some estimates.[102]

24. A significant development since 2002 is the emergence of video services offered by telephone companies, including AT&T, Qwest, and Verizon. As of the end of the second quarter of 2007, AT&T's U-Verse fiber-based video and Internet service passed over 4 million households.[103] AT&T also recently announced that its U-Verse video service has more than 100,000 customers.[104] Qwest has

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Comcast SportsNet Chicago; Comcast SportsNet West; SportsNet New York; Fox Sports New England; and Comcast Local (Detroit). *See* Comcast Comments at 13 n.39.

[95] *See 2002 Extension Order*, 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247, ¶ 5).

[96] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a cable operator was 78.11 percent as of June 2001 and 69.41 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1338, Table C-1 (78.11 percent) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (69.41 percent). More recent data indicates that the portion of MVPD subscribers served by cable operators is now approximately 67 percent. *See* Cablevision Comments at 2 (stating that cable's market share is 67 percent); Comcast Comments at 8 (stating that cable's market share is 67.8 percent as of the end of 2006); NCTA Comments at 4 (stating that cable's market share is 66.9 percent).

[97] *See 2002 Extension Order*, 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247, ¶ 7).

[98] *See 12th Annual Report*, 21 FCC Rcd at 2507, ¶ 10 and 2617, Table B-1; *see also* CA2C Comments at 5 (stating that there were 65.6 million cable subscribers as of December 2006).

[99] *See 2002 Extension Order*, 17 FCC Rcd at 12134, ¶ 23 (citing *8th Annual Report*, 17 FCC Rcd at 1338, Table C-1).

[100] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a DBS operator was 18.2 percent as of June 2001 and 27.72 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1388, Table C-1 (18.2 percent) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (27.72 percent). More recent data indicates that the portion of MVPD subscribers served by DBS operators is now over 30 percent. *See* Letter from Stephanie L. Podey, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 06-189 (June 13, 2007), Attachment at 1 (stating that DBS operators have an over 30 percent share of the MVPD market); *see also* NCTA Comments at 6 (same); Time Warner Reply Comments at 1 (same).

[101] *See 2002 Extension Order*, 17 FCC Rcd at 12134, ¶ 23.

[102] We note that, according to the Commission's annual competition reports, the number of MVPD subscribers receiving their video programming from a DBS operator was 16.07 million as of June 2001 and 26.12 million as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1338, Table C-1 (16.07 million) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (26.12 million). More recent data indicates that the number of DBS subscribers is now 29.6 million. *See* Letter from Stephanie L. Podey, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 06-189 (June 13, 2007), Attachment at 1 (stating that, as of March 31, 2007, DIRECTV had 16.19 million subscribers and EchoStar had 13.42 million subscribers); *see also* Cablevision Comments at 12 (stating that DIRECTV has 16 million subscribers and EchoStar has 13.1 million subscribers).

[103] *See* Media Kits: AT&T U-Verse, http://www.att.com/gen/press-room?pid=5838 (last visited Sept. 4, 2007).

[104] *See* More Than 100,000 Customers Choose AT&T U-verse Over Cable, http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24309 (last visited Sept. 7, 2007).

twenty-one cable franchises and provides nearly 60,000 subscribers with multichannel video service in Arizona, Colorado, Nebraska, and Utah.[105] Verizon, which introduced its fiber-based FiOS TV service in September 2005, had 515,000 video subscribers at the end of the second quarter of 2007.[106] Verizon's FiOS TV was available for sale to nearly 3.9 million premises in nearly 500 communities in 12 states as of the end of the second quarter of 2007.[107] Other wireline Broadband Service Providers ("BSPs") also offer video services in competition with cable operators, including RCN, WideOpenWest, Knology, and Grande.[108] Some wireline entrants cite a 2004 Government Accountability Office ("GAO") Report which concludes that wireline video entry provides more price discipline to cable than DBS and is more likely to cause cable operators to enhance their own services and to improve customer service.[109] In response, cable MSOs argue that wireline entry does not have a greater impact on cable prices than DBS entry.[110] Despite the significant investments made in competitive wireline networks, AT&T notes NCTA's estimate that wireline entrants have no more than 1.9 percent of all MVPD subscribers.[111]

25. The cable industry also cites other potential sources of video competition, such as SMATV systems,[112] providers of video on the Internet (such as YouTube, Google, and Akimbo),[113] over-the-air broadcast television,[114] DVDs and videotape purchases and rentals,[115] municipal and non-municipal utilities,[116] and providers of mobile video services.[117] Comcast also argues that in every

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[105] *See* Qwest Comments at 1 n.2.

[106] *See* Verizon Posts Strong 2Q 2007 Results Highlighted by Gains in Earnings, Consolidated Margins and Cash Flows, http://newscenter.verizon.com/press-releases/verizon/2007/verizon-posts-strong-2q-2007.html (last visited Sept. 4, 2007).

[107] *See id.*

[108] *See 12th Annual Report*, 21 FCC Rcd at 2549-50, ¶¶ 89-90.

[109] *See* BSPA Comments at 3 (citing Government Accountability Office ("GAO"), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004)); *see also* AT&T Comments at 3; CA2C Comments at 8 (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 21 FCC Rcd 15087, 15091 (2006) ("*2006 Cable Price Report*")); Qwest Comments at 5-6; Verizon Reply Comments at 7-8.

[110] *See* Comcast Reply Comments at 11. Comcast claims that the GAO Report cited by competitive MVPDs is deficient in significant respects. *Id.* NCTA cites a previous study which it claims demonstrate that lower prices are the result of anomalous circumstances not relevant to wireline entry. *See* NCTA Reply Comments at 5 (citing Reply Comments of NCTA, MB Docket No. 04-227 (August 25, 2004) (attaching Steven S. Wildman, "Assessing the Policy Implications of Overbuild Competition")); *see also* Comcast Reply Comments at 10-12.

[111] *See* AT&T Comments at 4 (citing NCTA Comments, MB Docket No. 06-189 (November 29, 2006) at 9).

[112] *See* Cablevision Comments at 13 (citing *12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130) and Appendix A at A-11.

[113] *See* Cablevision Comments at 14, 21 (citing *12th Annual Report*, 21 FCC Rcd at 2567-68, ¶ 138) and Appendix A at A-12 - A-13; Comcast Comments at 8-11. Cable MSOs also note that some popular programs are available online in their entirety and that some networks are developing original content for the Internet. *See* Cablevision Comments at Appendix A at A-12 - A -13; Comcast Comments at 10.

[114] *See* Cablevision Comments at 15; Comcast Comments at 9.

[115] *See* Cablevision Comments at 15; Comcast Comments at 9.

[116] *See* Cablevision Comments at 13-14 and Appendix A at A-10, A-18.

[117] *See* Cablevision Comments, Appendix A at A-14 - A-18; Comcast Comments at 9.

community, consumers can choose from a minimum of three MVPDs, and states that in many communities a fourth or fifth MVPD is available or will be soon.[118] Cablevision states that DIRECTV and EchoStar have at least double the number of subscribers of every cable MSO, with the exception of Time Warner and Comcast.[119] Comcast asserts that the competition that exists today far exceeds that which existed three years ago when the Commission concluded that "[T]he vast majority of Americans enjoy more choice, more programming and more services than any time in history."[120]

26. Commenters in favor of extending the prohibition state that the figures cited by the cable industry are misleading. EchoStar claims that national DBS penetration figures obscure the extent of competition on a local or regional basis where DBS penetration is much lower than the national average.[121] While the number of DBS subscribers has increased by 11.6 million since the *2002 Extension Order*, CA2C notes that cable subscribership during the same period decreased by less than one million, demonstrating that cable operators have maintained their position in the market.[122] Some competitive MVPDs argue that the continued ability of cable operators to raise prices in excess of inflation demonstrates the lack of competition in the video marketplace.[123] Competitive MVPDs also assert that barriers in the MVPD market still persist, as demonstrated by the Commission's efforts to promote greater competition.[124] CA2C notes that the Commission in its decision on cable franchising reform found that in the vast majority of communities around the country, "cable competition simply does not exist."[125] Some competitive MVPDs disagree with the assertion by the cable industry that mobile video, Internet video, and DVDs are substitutes for cable television.[126] Moreover, competitive MVPDs state that only 2.9 percent of MVPD subscribers receive service from an alternative provider to cable or DBS.[127]

27. *Consolidation of the Cable Industry*. The cable industry has continued to consolidate since 2002. During this period, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased from 48 percent[128] to between 53 and 60 percent, by some estimates, after taking into account the recent

[118] *See* Comcast Comments at 6-7.

[119] *See* Cablevision Comments, Appendix A at A-1.

[120] *See* Comcast Comments at 6 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 4 (2004)).

[121] *See* EchoStar Reply Comments at 4-5 (stating that in some major markets, cable's market share is above 80 percent, and noting that the two DBS operators have only a collective market share of 15 percent in Cablevision's market areas).

[122] *See* CA2C Comments at 5; *see also* AT&T Comments 3-4; USTelecom Comments at 4.

[123] *See* CA2C Comments at 7 (stating that annual cable rate increases have been more than double the general rate of inflation in most markets); *see also* Consumer Groups Reply Comments at 2.

[124] *See* CA2C Comments at 6 (citing *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) ("*Local Franchising Report and Order*"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007) ("*MDU Access NPRM*")); USTelecom Comments at 3.

[125] *See* CA2C Comments at 5 n.7 (citing *Local Franchising Report and Order*, 22 FCC Rcd at 5110, ¶ 19).

[126] *See* AT&T Reply Comments at 11; EchoStar Reply Comments at 6 n.8; RCN Reply Comments at 4-5.

[127] *See* USTelecom Comments at 10 (citing *12th Annual Report*, 21 FCC Rcd at 2506-07, ¶ 8).

[128] *See 2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 21(citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.[129] Moreover, the percentage of MVPD subscribers receiving their video programming from one of the four largest *vertically integrated* cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased significantly since 2002, from 34 percent[130] to between 54 and 56.75 percent, by some estimates.[131] Thus, as EchoStar notes, while the market share of small-to-medium sized, non-vertically integrated cable operators has declined, the market share of the large vertically integrated cable operators has increased since 2002.[132] Verizon notes that, in 2002, only three of the largest six cable operators owned satellite programming networks, whereas today five of the largest six cable operators own satellite programming networks.[133]

28. *Clustering of Cable Systems.* The amount of regional clustering of cable systems has remained significant.[134] The percentage of cable subscribers that are served by systems that are part of

[129] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs was 47.67 percent as of June 2001 and 47.78 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1341, Table C-3 (47.67 percent) *with 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3 (47.78 percent). More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased to between 53 and 60 percent. *See* Verizon Comments at 11 (calculating a percentage of 53 percent by adding the percentage of subscribers served by Adelphia (5.50 percent) to the percentage of subscribers served by Comcast (22.99 percent), Time Warner (11.69 percent), Cox (6.73 percent), and Charter (6.37 percent), as those figures are stated in the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3)); USTelecom Comments at 9 (calculating this percentage using market share figures for Cox (6.73 percent) and Charter (6.37 percent) from the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3) and for Comcast (28.7 percent) and Time Warner (17.9 percent) from the *Adelphia Order*, 21 FCC Rcd at 8206, ¶ 2).

[130] *See 2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

[131] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs was 34.26 percent as of June 2001 and 44.63 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1341, Table C-3 (34.26 percent) *with 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3 (44.63 percent). More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased to between 54 and 56.75 percent. *See* EchoStar Comments at 5 (calculating a percentage of 56.75 percent using market share figures for Cox (6.73 percent) and Cablevision (3.22 percent) from the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3) and for Comcast (28.90 percent) and Time Warner (17.9 percent) from the *Adelphia Order* (21 FCC Rcd at 8206, ¶ 2)); Cablevision Reply Comments at 10-11 n.36 (calculating a percentage of 54 percent taking into account an increase in the total number of MVPD households by 4.5 million since the *Adelphia Order* and Comcast's net loss of 600,000 subscribers arising from its Patriot Media and Insight Communications transaction announcements). Cablevision contends that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs is the same as in 2001. *See* Cablevision Reply Comments at 10-11 n.36.

[132] *See* EchoStar Reply Comments at 4-5.

[133] *See* Verizon Comments at 11-12 (citing *2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 and *12th Annual Report*, 21 FCC Rcd at 2622-25, Table C-1 and 2644-49, Table C-3).

[134] Clustering refers to a strategy whereby cable MSOs concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. *See Adelphia Order*, 21 FCC Rcd at 8315, ¶ 264. This strategy is accomplished through purchases and sales of cable systems, or by system "swapping" among MSOs. *See id.*

regional clusters has increased since 2002, from 80 percent[135] to as much as 85 to 90 percent, by some estimates, taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.[136]

3. Ability and Incentive

29. Our analysis of whether the exclusive contract prohibition continues to be necessary requires us to assess whether, in the absence of the exclusive contract prohibition, vertically integrated programmers would have the ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs and, if so, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming.[137] As discussed below, we conclude that there are no good substitutes for some satellite-delivered vertically integrated programming and that such programming therefore remains necessary for viable competition in the video distribution market. Based on this finding, we conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule. Although we find some trends in the markets for both video programming and video distribution since 2002 that might decrease the incentive of vertically integrated programmers to withhold programming from competitive MVPDs, we also find some trends that increase their incentive to withhold programming, such as the increase in horizontal consolidation of the cable industry, the increase in cable clustering, and the recent emergence of new competitors. We also find specific factual evidence that, where the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers have withheld and continue to withhold programming from competitive MVPDs. We thus conclude that vertically integrated programmers continue to have the incentive to favor their affiliated cable operators over competitive MVPDs. Accordingly, we conclude that the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[138] We note, however, that Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant. While we conclude herein that market developments since 2002 were not sufficient to allow us to lift the exclusive contract prohibition at this time, there nevertheless may come a point when these developments will be sufficient to allow the prohibition to sunset. We caution competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming.

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[135] *See 2002 Extension Order*, 17 FCC Rcd at 12133-34, ¶ 22 (citing *8th Annual Report*, 17 FCC Rcd at 1252, ¶ 14).

[136] We note that, according to the Commission's annual competition reports, the percentage of cable subscribers served by systems that are part of regional clusters was 80.4 percent as of 2000 and 77.9 percent as of 2004. *Compare 8th Annual Report*, 17 FCC Rcd at 1340, Table C-2 (stating that, as of 2000, 108 cable system clusters were serving 54.4 million subscribers, or 80.4 percent of cable subscribers) *with 12th Annual Report*, 21 FCC Rcd at 2619, Table B-2 (stating that, as of 2004, 118 cable system clusters were serving 51.5 million subscribers, or 78.7 percent of cable subscribers). More recent data indicates that the percentage of cable subscribers that are served by systems that are part of regional clusters has increased to between 85 and 90 percent. *See* Consumer Group Reply Comments at 4-5 (estimating that 85 to 90 percent of cable subscribers are currently served by regional clusters after taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia).

[137] *See 2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16.

[138] 47 U.S.C. § 548(c)(5).

a. Ability

30. As discussed in this section, we conclude that satellite-delivered vertically integrated programming remains programming for which there are often no good substitutes and that such programming is necessary for viable competition in the video distribution market. In the *2002 Extension Order*, the Commission determined that the question of whether satellite-delivered vertically integrated programmers retain the ability to favor their affiliated cable operators over nonaffiliated MVPDs requires us to assess whether satellite-delivered vertically integrated programming remains programming that is necessary to the viability of competitive MVPDs and for which there are often no good substitutes.[139] If we conclude that satellite-delivered vertically integrated programming remains necessary to maintain the competitiveness of MVPDs in the current market, then favoritism by satellite-delivered vertically integrated programmers of their affiliated cable operators over competitive MVPDs would impair competition and diversity in the distribution of video programming.[140] In assessing the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators to the detriment of competing MVPDs, we consider whether developments in the last five years have diminished the importance of satellite-delivered vertically integrated programming or have affected the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators over other MVPDs.[141]

31. Cable MSOs note that the number of satellite-delivered national programming networks available to MVPDs has increased from 294 in 2002[142] to 531 in 2005.[143] While the number of vertically integrated satellite-delivered national programming networks has increased by twelve since 2002, cable MSOs note that the percentage of all satellite-delivered national programming networks that are vertically integrated has declined from 35 percent in 2002 to between 13.5 percent and 22 percent at present.[144] Comcast notes that 57 percent of national programming networks were vertically integrated when the exclusive contract prohibition in the 1992 Cable Act was enacted.[145] Cablevision argues that with over 500 programming channels available and more than 80 percent of these channels unaffiliated with cable, it is implausible that competition would be harmed if competitive MVPDs were denied access to a cable-affiliated network.[146]

32. Competitive MVPDs counter that the decrease in the percentage of satellite-delivered national programming networks that are vertically integrated is meaningless because it is attributable to an increase in the number of total programming networks available, most of which they contend have minimal subscriber bases and are targeted towards niche markets.[147] The more salient fact, competitive MVPDs argue, is that cable MSOs still control essential "must have" programming and that access to this

[139] *See id.* at 12135, ¶ 24.

[140] *See id.*

[141] *See id.*

[142] *See id.* at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

[143] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157; *see also* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[144] *See supra* ¶ 18; *see also* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (same); NCTA Comments at 5-6 (same).

[145] *See* Cablevision Comments at 19; Comcast Comments at 11-12; Comcast Reply Comments at 9.

[146] *See* Cablevision Reply Comments at 8.

[147] *See* CA2C Comments at 15; AT&T Reply Comments at 6-7; Verizon Reply Comments at 9.

programming remains key to the ability of competitive MVPDs to compete in the video distribution market.[148] They argue that it is not necessary for cable MSOs to control all essential programming to impact competition; rather, cable MSOs need only control certain programming that is "key to the decision by each major demographic group in choosing between alternate providers."[149] Numerous competitive MVPDs contend that, without access to such programming, their ability to compete will be compromised.[150]

33. With respect to regional programming, cable MSOs note that the number of regional programming networks, including RSNs, that are vertically integrated has declined since 2002.[151] With respect to non-sports regional networks, Cablevision notes that DBS providers carry few, if any, of these networks even though they are satellite-delivered and therefore subject to the program access requirements, including the exclusive contract prohibition.[152] Cablevision argues that this is consistent with the Commission's previous conclusion that the record in the *Adelphia* proceeding did not indicate that an MVPD's lack of access to regional non-sports programming would harm competition or consumers.[153] With respect to RSNs, cable MSOs note that the number of vertically integrated RSNs has decreased from twenty-four in 2002 to seventeen in 2005.[154] Moreover, Cablevision asserts that there are numerous substitutes for sports programming, such as unaffiliated team-owned and league-owned sports networks, sports content that is available over the Internet, and sports programming available from nearly every major broadcast network.[155] While DBS operators claim competitive harm from being unable to

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[148] *See* ACA Comments at 4; AT&T Comments at 8; BSPA Comments at 4; CA2C Comments at 9, 14; DIRECTV Comments at 6-7; EATEL Video Comments at 4; EchoStar Comments at 2; NRTC Comments at 6-7; NTCA Comments at 1; OPASTCO and ITTA Comments at 5; Qwest Comments at 5-7; RCN Comments at 3; SureWest Comments at 2-4; USTelecom Comments at 12; Verizon at 9; Consumer Groups Reply Comments at 6; SureWest Reply Comments at 3.

[149] *See* CA2C Comments at 14; *see also* BSPA Comments at 4; DIRECTV Comments at 6-7.

[150] *See* EATEL Comments at 1 (arguing that sunset of the exclusive contract prohibition would "effectively destroy" its ability to offer service); EchoStar Comments at 9 (stating that access to programming will "make or break" the ability of new entrants to compete); NRTC Comments at 20 (stating that an MVPD cannot "operate successfully" if that system lacks access to cable-affiliated networks such as CNN, HBO, TNT, and The Discovery Channel); OPSATCO/ITAA at 4 (arguing that rural telephone companies that serve as MVPDs would "no longer be economically viable" if the exclusive contract prohibition were to sunset); RCN Comments at 4 (stating that competitive MVPDs will "confront serious problems retaining subscribers" if access to "must have" programming is denied); SureWest Comments at 2 (stating that it would not survive "without access to the most popular video content").

[151] *See supra* ¶ 22; *see also* Cablevision Comments at 23.

[152] *See* Cablevision Comments at 22.

[153] *See id.* at 22 (citing *Adelphia Order*, 21 FCC Rcd at 8279, ¶ 169).

[154] *But see supra* ¶ 22 (concluding that there are now eighteen vertically integrated RSNs); *see also* Cablevision Comments at 23 (citing *2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47; *12th Annual Report*, 21 FCC Rcd at 2586, ¶ 183).

[155] *See* Cablevision Comments at 4, 24 and Appendix B at 21-22. Cablevision also contends that the claimed "must have" status of RSN programming is refuted by the fact that it lost only 2.1 percent of its subscribers during 2002 when it was unable to carry the YES network. *See id.* at 24. In response, Verizon argues that the "loss of a few subscribers by an entrenched incumbent cable operator due to the unavailability of programming pales in competitive significance to the inability of a new entrant to attract subscribers in the first place because it cannot offer 'must have' programming offered by the entrenched cable incumbent." *See* Verizon Reply Comments at 10 n.28.

access the terrestrially delivered Comcast SportsNet Philadelphia, Cablevision notes that DBS market penetration in Philadelphia has in fact tripled from four percent in 2000 to twelve percent at the end of 2006.[156] Moreover, Cablevision claims that DBS market penetration in Philadelphia is higher than in other metropolitan areas (Hartford-New Haven, Providence, and Springfield) and comparable to Boston and Baltimore.[157] Cablevision also notes that the Commission concluded in the *Adelphia* proceeding that DIRECTV failed to demonstrate that lack of access to an RSN in San Diego had a statistically significant effect on its market penetration.[158]

34. Competitive MVPDs counter that the ability of vertically integrated programmers to disadvantage unaffiliated competitors is particularly acute for regional programming – particularly RSNs.[159] Competitive MVPDs argue that RSNs are "must have" programming and that there are no readily acceptable substitutes for such programming.[160] Competitive MVPDs cite the Commission's decision in the *Adelphia* proceeding that "programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."[161] Competitive MVPDs note that DBS market penetration in Philadelphia and San Diego drops almost in half due to the lack of access to RSNs as compared to other similar markets where they have access to RSNs.[162] In response to the argument of cable MSOs that there is sufficient non-cable-affiliated sports programming available, competitive MVPDs argue that, where one MVPD has access to the most popular local sports programming and a competing MVPD does not, the availability of other sports programming to the competing MVPD is largely irrelevant.[163]

35. Cablevision disputes that there is any cable programming that can be considered "must have" and states that no commenter has provided empirical evidence to demonstrate that certain cable programming is "must have."[164] Cablevision argues that every type of national programming network faces ample competition.[165] Moreover, Cablevision notes that some competitive MVPDs do not carry certain RSNs despite their claims that such programming is "must have."[166] In response, competitive

[156] *See* Cablevision Comments at 25; Cablevision Reply Comments at 12.

[157] *See* Cablevision Comments at 25; Cablevision Reply Comments at 12.

[158] *See* Cablevision Comments at 26 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 148).

[159] *See* AT&T Comments at 15-16; BSPA Comments at 6, 17; CA2C Comments at 17; EchoStar Comments at 4; NTCA Comments at 4; OPASTCO/ITAA Comments at 5-6; RCN Comments at 4, 9; RICA Comments at 5; SureWest Comments at 3; USTelecom Comments at 14-15; Verizon Comments at 9-10; AT&T Reply Comments at 4; EchoStar Reply Comments at 11-12.

[160] *See* ACA Comments at 6; NTCA Comments at 4; OPASTCO/ITTA Comments at 5-6; RCN Comments at 4, 9; Verizon Comments at 9; AT&T Reply Comments at 4-5.

[161] *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189.

[162] *See* AT&T Comments at 17-18; CA2C Comments at 9.

[163] *See* AT&T Reply Comments at 5; RCN Reply Comments at 8; Verizon Reply Comments at 10.

[164] *See* Cablevision Reply Comments at 2, 8-9; *see also* Time Warner Reply Comments at 13 n.23. Cablevision, however, has referred to certain broadcast programming as "must have" in another Commission proceeding. *See* Comments of Cablevision Systems Corp., MB Docket No. 03-124 (June 16, 2003) at 3, 13-14, 18, 28 (referring to the Fox broadcast network as "must have").

[165] *See* Cablevision Comments, Appendix B at 14.

[166] *See* Cablevision Reply Comments at 12 (stating that EchoStar declined to carry an RSN in Washington, D.C. (MASN) for two years, and that it still declines to carry an RSN serving New York City (YES)).

MVPDs cite the Commission's economic analysis in the *Adelphia* proceeding where it concluded that exclusive access of cable operators to RSNs reduces the number of DBS subscribers.[167] Cablevision states that the Commission's findings in the *Adelphia Order* were based on a flawed regression analysis, thus precluding the Commission from relying on that decision here.[168]

36. Competitive MVPDs argue that access to vertically integrated programming is particularly critical for recent entrants in the video distribution market, such as telephone companies that have begun to enter the market since we last reviewed the exclusive contract prohibition.[169] They argue that access to vertically integrated programming is as critical for these recent entrants as it was for DBS entrants in the early 1990s.[170] Cable MSOs counter that one class of recent entrant – telephone companies such as AT&T and Verizon -- have far more resources than the cable MSOs and, therefore, they do not need government assistance to compete.[171] Moreover, they assert that there is no indication that recent entrants are having trouble securing programming.[172] Some competitive MVPDs argue that "must have" programming is essential to offering a viable video service and, in turn, the ability to offer a viable video service is "linked intrinsically" to broadband deployment.[173] Accordingly, CA2C argues that extending the exclusive contract prohibition is supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[174]

37. *Discussion*. Despite some pro-competitive developments over the past five years, we find that access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable substitutes to the incumbent cable operator in the eyes of consumers. What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and

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[167] *See* Verizon Reply Comments at 10; *see also* EchoStar Reply Comments at 7-8. RCN also refers to surveys it conducted which determined that approximately 40 to 58 percent of subscribers would refuse to change MVPDs if the new MVPD did not carry local sports programming. *See* RCN Comments at 10 n.27. In response, Cablevision argues that (i) this survey is five years old; (ii) RCN provides no information on its survey methodology; and (iii) on its face, the survey indicates that up to 60 percent of subscribers are indifferent to local sports programming. *See* Cablevision Reply Comments at 12 n.41.

[168] *See* Cablevision Comments, Appendix B at 24-25.

[169] *See* AT&T Comments at 9; Qwest Comments at 5; USTelecom Comments at 4, 6; Verizon Comments at 3, 6-7; Verizon Reply Comments at 11.

[170] *See* AT&T Comments at 2; CA2C Comments at 12.

[171] *See* Cablevision Comments at 5 ("Cablevision faces competition from . . . Verizon and AT&T, whose market capitalizations are 10 and 25 times larger, respectively, than Cablevision's. Each of those entities has the ability to invest in its own programming, just as Cablevision did."); Comcast Comments at 20; Time Warner Reply Comments at 21.

[172] *See* Cablevision Comments at 13; Comcast Comments at 18-21; Comcast Reply Comments at 17-19.

[173] *See Local Franchising Report and Order*, 22 FCC Rcd at 5132-33, ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted); *see also* ACA Comments at 14; CA2C Comments at 19; OPASTCO/ITTA Comments at 2; USTelecom Comments at 6-7; CA2C Reply Comments at 10-11; Qwest Reply at 3.

[174] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note); *see also* CA2C Comments at 19; CA2C Reply Comments at 10-11.

protection of competition in the video distribution marketplace.[175] While there has been a decrease since 2002 in the percentage of the most popular programming networks that are vertically integrated, we find that the four largest cable MSOs (Comcast, Time Warner, Cox, and Cablevision) still have an interest in six of the Top 20 satellite-delivered networks as ranked by subscribership,[176] seven of the Top 20 satellite-delivered networks as ranked by prime time ratings,[177] almost half of all RSNs,[178] popular subscription premium networks, such as HBO and Cinemax,[179] and video-on-demand ("VOD") networks, such as iN DEMAND.[180] Moreover, as discussed in Section III.A.3.b below,[181] the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs has increased from 34 percent[182] to between 54 and 56.75 percent.[183] The record thus reflects that popular national programming networks, such as CNN, TNT, TBS, and The Discovery Channel, among many others, in addition to premium programming networks, RSNs, and VOD networks, are affiliated with the four largest vertically integrated cable MSOs and that such programming networks are demanded by MVPD subscribers. We thus find that cable-affiliated programming continues to represent some of the most popular and significant programming available today. As discussed in more detail below, the record

[175] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32; DIRECTV Comments at 7 ("There is – to be sure – more programming available now than there was in 2002. But, as the Commission explained then, the sheer amount of programming available has little to do with the must-see nature of any particular network."); *see also* AT&T Comments at 10-11; EchoStar Comments at 7; AT&T Reply Comments at 6-7; Qwest Reply Comments at 3-4; Verizon Reply Comments at 8-9. Indeed, the largest cable MSO – Comcast – concedes that "to the extent that MVPDs cannot survive without access to certain programming . . . what matters is whether that programming is 'must-have' in order to compete." *See* Comcast Comments at 24.

[176] These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News. *See* Kagan Research, LLC, *Network Census: June 30*; *Cable Program Investor* (July 28, 2006) at 11. We note that AT&T cites data which also includes Cartoon Network among the Top 20 satellite-delivered networks as ranked by subscribership. *See supra* note 70.

[177] These networks are TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel. *See* Nielsen Media Research, *Top 50 Cable Networks Primetime* (June 2006).

[178] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183.

[179] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32 (stating that although subscription premium networks such as HBO and Cinemax "are not among the top programming services in subscribership," they nonetheless "make an important contribution to an MVPD's revenue and profits"). Competitive MVPDs argue that first-run programming produced by HBO and other premium networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator. *See* AT&T Comments at 13-14 (quoting a cable executive as stating in 1990 that "certain channels such as . . . HBO are, for all practical purposes, 'must carries' for all cable systems" and contending that this statement "is only more true today" (citing *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5027, ¶ 118 (1990))); BSPA Comments at 6; Verizon Comments at 9 (stating that a new entrant needs to be able to offer customers premium programming such as HBO and Cinemax "in order to compete successfully against an established video provider").

[180] Competitive MVPDs argue that movie libraries owned by VOD networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator. *See* RCN Comments at 4 ("film libraries are similarly 'must have' for video on demand offerings (there is only one Gone with the Wind)").

[181] *See infra* Section III.A.3.b.

[182] *See 2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

[183] *See supra* note 131 (discussing percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs).

shows that vertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market.[184]

38. We disagree with cable MSOs to the extent they argue that there is no programming that can be considered essential for viable competition and that all programming networks have one or more competitively equal substitutes.[185] We recognize that there has been a net increase in the total amount of available programming networks and that there may be substitutes for some cable-affiliated programming networks.[186] Nevertheless, there exists a continuum of vertically integrated programming, "ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact)."[187] As we stated in the *2002 Extension Order*, "cable programming – be it news, drama, sports, music, or children's programming – is not akin to so many widgets."[188] We further explained that, when an MVPD "loses access to a popular national news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channel. Moreover, even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute."[189] Cable MSOs do not provide sufficient evidence of adequate substitutes for popular cable-affiliated programming.[190] We doubt, for example, that fans of one of the most popular cable programs, such as HBO's "The Sopranos," had their competitive MVPD been denied access to the cable-affiliated HBO network, would have regarded the original programming on other premium networks, such as Showtime, an adequate substitute for their favorite show. Despite the increase in available programming over the past five years, we find that cable operators still own popular programming for which there are no close substitutes.[191] The availability of new, non-integrated networks does not mitigate the adverse impact on competition of a competitive MVPD's inability to access popular vertically integrated programming. The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes.[192]

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[184] *See infra* ¶ 39 (discussing impact on competitive MVPD subscribership from withholding of cable-affiliated programming).

[185] *See* Cablevision Reply Comments at 2, 8-9 and Appendix B at 14; *see also* Time Warner Reply Comments at 13 n.23.

[186] *See* Cablevision Comments at 2-3, 18-27; Comcast Comments at 11-13; NCTA Comments at 5-7; Time Warner Reply Comments at 2.

[187] *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33.

[188] *Id.*

[189] *Id.*

[190] Cablevision lists various cable networks that offer certain categories of programming (such as news, sports, weather, and music), but offers no evidence that these networks are substitutable for one another. *See* Cablevision Comments at 20 n.69.

[191] *See supra* ¶¶ 18, 22, 37 (discussing cable's ownership of significant programming networks).

[192] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32 ("We agree with competitive MVPDs that access to vertically integrated programming continues to be necessary in order for these MVPDs to remain viable in the (continued....)